Supreme Court, U.S.
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No. 92-1160

In The

Supreme Court of the United States

October Term, 1992

PAUL B. WARD,

Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL B. WARD
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Westerville, Ohio 43081
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QUESTIONS PRESENTED FOR REVIEW

1. Did the appeals court err in sanctioning two district court decisions that petitioner had "failed to demonstrate that there was a genuine issue of material fact pertaining to this request for documents or due process claims"?

2. Did the district court err in 1987, in the 1984 case, by concealing the fact that respondents had filed a Response to petitioner's Memo Contra which included petitioner's 7-page Exhibit "A", a fact which petitioner did not discover until he was furnished a copy of the 1984 Docket Sheet in May 1992?

LIST OP PARTIES

PAUL B. WARD
873 Thirlwall Court
Westerville, OH 43081

Plaintiff

v.

OFFICE OF PERSONNEL MANAGEMENT
1900 E Street, N.W.
Washington, DC 20415

and

NATIONAL PERSONNEL RECORDS CENTER
111 Winnebago Street
St. Louis, MO 63113

and

DEPARTMENT OF THE ARMY
The Pentagon
Washington, DC 20530

and

MERIT SYSTEMS PROTECTION BOARD
Washington, DC 20419

and

UNITED STATES OF AMERICA

Defendants

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[Petitioner is not capable of citing any authorities.]

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No.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. Memorandum and Order dated April 29, 1987, Case No. C2-84-0340 (App. C at 12a).

2. Opinion and Order dated April 8, 1992, Case No. C2-91-0669 (App. B at 4a).

3. Order dated October 7, 1992, Appeals Case No. 92-3395 (App. A at 1a).

STATEMENT OF JURISDICTION

Date of Appeals Court Order: October 10, 1992

Petitioner is not capable of citing any statutory provisions. Instead, petitioner refers to Court Rule 17.1(a):

> *When a federal court of appeals has* rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has *so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.*

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fifth Amendment to the Constitution:

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

The Privacy Act of 1974:

> Subsection (d)
>
> (1) upon request of any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, ...
>
> (2) permit the individual to request amendment of a record pertaining to him . . . .

Regulations (*See* Petitioner's Exhibit 15, 12 pages).

STATEMENT OF THE CASE

On August 16, 1963, with refusal of due process, petitioner Ward was removed from federal employment at Army Map Service, Washington, D.C. At that time it was common knowledge, through newspaper columnists, that the Civil Service Commission (CSC) was unfair to appellant discharged employees, by refusing access to information which had been used against them. Therefore, petitioner, after defending against stated charges, two times requested to be informed about any other unstated charges. Both requests were refused at agency and two appellate levels, and in 1965 CSC refused petitioner a right of further appeal. In 1964 petitioner discovered official recognition of wholesale refusal of due process. Also in 1964 petitioner discovered that the grievance examiner's Report of Inquiry included a new charge, supported by citation of eighteen inches of undisclosed documents of derogatory information, which was claimed to be petitioner's Official Personnel Folder (OPF).

Based on documents which petitioner had, he prepared a 337-page Appeal Statement, completed in 1979. He asked an attorney to get that Appeal Statement entered into the record somewhere. The Civil Service Reform Act of 1978 (CSRA) previously had transformed CSC into the Office of Personnel Management (OPM) and established a new appellate authority, the Merit Systems Protection Board (MSPB). Petitioner's attorney, under provisions of the Privacy Act of 1974, requested OPM to furnish petitioner's OPF. OPM, with form-letter dated September 17, 1979, furnished a fraudulent OPF, a half inch of "exact copies of all records permanently retained in the OPF of Mr. Ward, as prescribed by Office of Personnel Management (OPM) instructions" plus a half-inch of "several documents that are inappropriate for permanent retention therein." The other seventeen inches of documents were missing. Petitioner asked his attorney to sue for the missing documents, and he refused because of the claim of "all records permanently retained." Previously, Department of the Army (DA) regulations had described the documents of derogatory information as "part of the official personnel folder file" and as "permanent records."

Petitioner's first lawsuit, Civil Action No. C2-84-0340, *Ward v. Wilkinson, et al.*, filed February 17, 1984, in the United States District Court for the Sourthern District of Ohio, Eastern Division, in Columbus, was for damages, injunctive and declaratory relief, including requests for documents and for addition to the OPF; resulting in Judge Graham's decision dated April 29, 1987, stating, "The plaintiff . . . has failed to demonstrate that there is a genuine issue of material fact pertaining to his request for documents or due process claims" (22a).

Petitioner's *pro se* second lawsuit, Civil Action No. C2-91-0669, *Ward v. Office of Personnel Management, et al.*, filed August 16, 1991, in the same district court, was a class-action Complaint for Enforcement of the Privacy Act and for Due Process; resulting

in Judge Smith's decision dated April 8, 1992, repeating the same conclusion.

Petitioner's *pro se* appeal to the United States Court of Appeals for the Sixth Circuit, Case No. 92-3395, docketed April 28, 1992, stated, "Court Decision dated April 8, 1992, disregarded plaintiff's comments regarding wrong statements in the Court Decision dated April 29, 1987, and repeated the same wrong statements" and "both Court Decisions failed to recognize a violation of the Privacy Act of 1974 and also refusal of due process as provided for in the Fifth Amendment. Also, both Court Decisions failed to recognize applicability of mandamus." Petitioner was disputing the statement of facts in both district court decisions, as explained in petitioner's Exhibits 15 and 18.

Appeals Court Order, adverse decision dated October 7, 1992, did not acknowledge that petitioner had any genuine issues of material fact, but, instead, implied otherwise, by stating, "Summary Judgment is proper if there is no genuine issue of material fact . . . (2a).

Petitioner's issues with all of these court decisions is whether or not petitioner has presented genuine issues of material fact in regard to petitioner's claims under the Privacy Act and under the due process provision of the Fifth Amendment, both claims being class-action claims.

Petitioner believes he has presented an abundance of evidence that he has four genuine issues of material fact. Also, petitioner has reason to believe that the documents of derogatory information are still in the possession of the Department of the Army, by reason of the fact that DA did not return those documents to OPM. Further, petitioner expects that the court should give consideration to documentary evidence adverse to respondents which respondents have provided to petitioner in the fraudulent 1979 OPF, which is

included in petitioner's Volume No. 5. Petitioner seeks to have Case No. C2-91-0669 returned to the District Court for trial, with a stipulation that petitioner has demonstrated that there are four genuine issues of material fact pertaining to his request for documents and for due process claims.

Petitioner does not understand what happened in the processing of the 1984 case in 1987, Docket Sheet record entry numbers 19, 20, 21.

BASIS FOR FEDERAL JURISDICTION

1991 Complaint:

> 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. Section 552a (Privacy Act) and Fifth Amendment (due process).

REASONS FOR GRANTING THE WRIT

Petitioner's citations of evidence he has presented, in the two district court cases and the appeals court case, concern four issues, as follows: (A) Was there refusal of due process in each of four disciplinary actions against this petitioner employee in the 1960s? (B) Does that refusal of due process warrant class-action status? (C) Was there violation of the provisions of the Privacy Act by the Office of Personnel Management and by the Department of the Army in 1979? (D) Does that violation warrant class-action satus? Argument consists of citations of explanatory statements and some documents, most included in the processing of petitioner's previous court actions, as follows:

(A) With respect to refusal of due process in each of four disciplinary actions:

1. Petitioner's first citation of requested documents, in this case, was his letter of July 31, 1984, to defense attorney, requesting, by way of discovery, certain documents which were listed as 22 Items or groups of Items which petitioner knew were supposed to be included in his Official Personnel Folder (OPF). (That letter was not included in the processing of the case, therefore it does not have a Docket Sheet record entry number.)

2. That listing of 22 Items or groups of Items was later included in petitioner's letter of May 1, 1989, to Office of Personnel Management (OPM). *See* Respondents' Exhibit A, letter dated May 1, 1989, pages 10-12 (A46-48). (Those Items are some of the documents which petitioner asked for, two times, during the processing of the removal disciplinary action in 1963. Refusal of those documents amounted to refusal of due process.)

3. On January 30, 1987, in the 1984 case, petitioner's attorney filed petitioner's memorandum contra to respondents' Motion to Dismiss or for Summary Judgment, together with Exhibit "A", titled Detailed Explanation of Four Disciplinary Actions. *See* petitioner's Memorandum Contra (A 291). (This Exhibit "A" identified the refusal of due process in each of the four disciplinary actions. *See* Exhibit "A" (A 295-301).)

4. In 1963 a grievance examiner introduced a new charge concerning "Mr. Ward's officially reported behavior pattern at his work site over the past several years" against defendant employee, this petitioner. The new charge was unknown to defendant employee, thus refusal of due process. *See* petitioner's Exhibit 6, paragraph 37 (A 131).

5. The grievance examiner cited numerous undisclosed documents of derogatory information, thus more refusal of due process. *See* petitioner's Exhibit 7 (A 138).

6. The 1979 OPF contained two documents relating to

petitioner's first disciplinary action: Item No. 482 and Item No. 483, thus more refusal of due process. *See* Item No. 482 (A 322). *See* Item No. 483 (A 323). (The documents referred to in Item No. 483 are the same documents which later were cited as derogatory information in petitioner's third disciplinary action.)

7. The 1979 OPF contained another two documents relating to petitioner's second disciplinary action: Item No. 502 and Item No. 504, thus more refusal of due process. *See* Item No. 502 (A 324-333).

8. The 1979 OPF contained some other correspondence relating to petitioner's fourth disciplinary action: Item No. 509. That Item included two letters from the Secretary of the Army, which, when considered together, verify the refusal of due process. *See* Item No. 509 (A 335, 337). *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 4, page 2 (A 411).

9. Two times during the processing of the fourth disciplinary action against petitioner, petitioner had asked for an opportunity to defend against any undisclosed information, thus seeking due process. Both requests were refused. *See* petitioner's Exhibit 18, paragraphs 3, 4 (A 207).

10. Petitioner has cited at least twenty provisions of applicable Regulations which were violated during the processing of his Appeal in the fourth disciplinary action, which constitutes refusal of due process. *See* petitioner's Exhibit 18, paragraph 2 (A204-207). (Those violations are fully explained in petitioner's Exhibit 15, paragraphs 61-80 (A 183-189), omitted here, and are evident by referring to: (a) the grievance examiner's Report of Inquiry, petitioner's Exhibit 6; (b) the 134-page Stenographic Transcript of the grievance examiner's Hearing, which is in petitioner's Volume No. 3; (c) 20 pages of explanation of Misconceptions Concerning the Hearing, paragraphs 641-707, and 18 pages of explanation of Misconceptions Concerning the Report

of Inquiry, paragraphs 708-742, in petitioner's Appeal to the Secretary of the Army, which is petitioner's Volume No. 4. Volumes No. 3 and No. 4 are two of the five volumes which petitioner wants to be included in his Official Personnel Folder, by reason of the fact that the undisclosed documents of derogatory information were included there.)

11. Without rebuttal of petitioner's defenses to the charges against him, and without acceding to petitioner's request for information about the undisclosed accusations, the Army Map Service agency then submitted all that information to the grievance examiner, which constitutues refusal of due process. *See* petitioner's Exhibit 18, paragraphs 3, 4 (A 207).

12. The grievance examiner violated twenty provisions of applicable Regulations, thus refusing due process. *See* petitioner's Exhibit 18, paragraphs 5, 6, 11 (A 208, 209).

13. The grievance examiner introduced a new charge against petitioner, which was unknown to petitioner, thus refusing due process. *See* petitioner's Exhibit 18, paragraph 6 (A 208). *See* respondents' Exhibit A, letter dated May 1, 1989, *fifth instance*, page 5 (A 41).

14. The Chief of Engineers introduced a new charge against petitioner, which was unknown to petitioner, thus refusing due process. *See* petitioner's Exhibit 18, paragraph 7 (A 208). *See* respondents' Exhibit A, letter dated May 1, 1989, *fifth instance*, page 5 (A 41).

15. The Secretary of the Army's adverse decision was based on consideration of eighteen inches of undisclosed documents, and without petitioner's Appeal Statement, thus refusing due process. *See* petitioner's Exhibit 18, paragraph 8 (A 208).

16. The grievance examiner cited personnel records which were refused disclosure to petitioner, in violation of due process. *See* petitioner's Exhibit 18, paragraph 10 (A 209).

17. Both Army Map Service and the Chief of Engineers refused petitioner's requests to be informed about any other information which was used against him, which was not included in the charges against him in the letter of advance notice, and which were cited by the grievance examiner as eighteen inches of documents in his OPF, thus refusal of due process. *See* Petitioner's Exhibit 18, paragraph 19 (A 212).

18. The Chief of Engineers and the Secretary of the Army overlooked, ignored, or disregarded violation of approximately twenty provisions of applicable Regulations, which constitutes refusal of due process. *See* petitioner's Exhibit 18, paragraph 29 (A215, 216).

19. Petitioner's Exhibit "A" explains the refusal of due process in each of four disciplinary actions. *See* petitioner's Exhibit 18, paragraph 34 (A 217).

20. The Civil Service Commission refused petitioner a right to appeal, which prevented petitioner from complaining about the refusal of due process. *See* petitioner's Exhibit 18, paragraph 38 (A 218).

21. The undisclosed documents of derogatory information included the supervisor's replies to petitioner's complaints about the fraudulent operation of the personnel system, and also the reports of investigations concerning those complaints, thus refusal of due process. *See* petitioner's Exhibit 18, paragraph 40 (A 219).

22. Court decision in the 1984 case includes three serious errors: (a) substituting "performance appraisals" for eighteen inches of Official Personnel Folder; (b) introducing a wrong

statute of limitations; (c) disregarding mandamus with respect to the violation of twenty provisions of applicable Regulations. *See* Petitioner's Exhibit 18, paragraph 42 (A 219). *See* respondents' Exhibit A, letter dated May 1, 1989, *sixth instance* and *seventh instance*, pages 5, 6 (A 41, 42).

23. Both district court decisions failed to recognize refusal of due process and applicability of mandamus. *See* Pro Se Appellant's Brief, paragraph 3, page 2 (A 381).

24. Petitioner cited two questions which the appeals court had previously failed to consider, in 1987. *See* Pro Se Appellant's Brief, paragraph 5, page 2 (A 381) and the attached two questions in Proposed to be Raised on Appeal, dated July 10, 1987 (A 387).

25. Petitioner has about fifty percent of the undisclosed documents of derogatory information which were concealed in his OPF, and which the grievance examiner used to introduce a new charge against petitioner, which constitutes refusal of due process. *See* Pro Se Appellant's Brief, Explanation Concerning Wrong Statements, paragraph 5, page 2 (A 383). (The fifty percent of the undisclosed documents, which petitioner has, are included in petitioner's Volumes No. 1, No. 2, No. 3.)

26. Petitioner's Official Personnel Folder consisted of two files. The second file, unknown to petitioner, contained the undisclosed documents of derogatory information, thus refusal of due process. *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 1, page 1 (A 410).

27. Three Items in petitioner's 1979 OPF indicate the existence of the undisclosed documents. *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 4, page 2 (A 411).

28. Army Map Service correspondence with the Civil Service Commission included some of the undisclosed documents of derogatory information. *See* Item No. 482 (A 322) and Item No. 483 (A 323).

29. Army Map Service internal correspondence listed 63 Items of undisclosed documents of derogatory information. *See* Item No. 502 (A 324-333).

30. Department of the Army correspondence acknowledged consideration of the file of documents of derogatory information. *See* Item No. 509 (A 335, 337).

(B) With respect to class-action status of the refusal of due process:

31. According to newspaper reports, the district court in Washington barred lawsuit for certain documents of an Official Personnel Folder. In the case of disciplinary actions against federal employees, this bar to disclosure amounted to refusal of due process. Petitioner cannot identify that court action. *See* 1991 Complaint, paragraph 12 (A 6). *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 2, pages 1, 2 (A 410, 411).

32. A newspaper columnist reported that a former government official had acknowledged that in discharge cases the procedures have not been fair. "In many instances the officials hearing these cases are allowed access to irrelevant and unsupported charges that never are divulged to the accused, he said." *See* petitioner's Exhibit 5 (A 121). (This supports petitioner's claim regarding the unidentified court action. It is wholesale refusal of due process).

33. Two certain Department of the Army (DA) Regulations,

when considered together, *guarantee* refusal of due process. Paragraph 19 of Army Regulations 345-262, dated 1958, provided for inclusion of a special file of documents of derogatory information in an employee's Official Personnel Folder, restricted from disclosure to the employee and considered to be permanent records. *See* Plaintiff's Exhibit 15, paragraph 53 (A180). Civilian Personnel Regulations E2.5-4b, dated 1962, provided that the employee's OPF would be considered by appellate officials, even though the proper OPF documents do not include any documents relating to an appeal, thus consideration of the undisclosed documents of derogatory information. *See* petitioner's Exhibit 15, paragraph 50 (A 179). Also, *see* petitioner's Motion to Amend Petitioner's Motion for Determination as Class Action, paragraph 6 (A 228,229). Also, *see* respondent's Exhibit A, letter dated May 1, 1989, *fifth instance*, page 5 (A 41). (Paragraph 19 of AR 345-262 is qualified by CPR R1.3-2c(1). *See* Petitioner's Exhibit 15, paragraph 54 (A 180). CPR R1.3-2c(1) is qualified by CPR R2.2-5. *See* petitioner's Exhibit 15, paragraph 55 (A 181). This explains how an employee can be charged with some offense which he does not know about and cannot defend against.)

34. It was the policy of the federal government to refuse disclosure of documents of derogatory information, thus refusing due process. *See* Petitioner's Exhibit 18, paragraph 9 (A 208, 209). *See* Pro Se Appellant's Brief, Explanation Concerning Wrong Statements, paragraph 9, page 2 (A 383). *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 3, page 2 (A 411).

35. The refusal of due process in 1963 is a circumstance which is applicable to all other federal employees who are subject to disciplinary actions. *See* petitioner's Motion to Amend Petitioner's Motion for Determination as Class Action, paragraph 4 (A 227).

36. Newspaper reports cited the Civil Service Commission's unfair treatment of charged employees, due to the district court's bar against lawsuit for certain documents of derogatory information. *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 2, pages 1, 2 (A 410, 411).

(C) With respect to violation of the provisions of the Privacy Act:

37. Petitioner's first request, in 1979, under provisions of the Privacy Act, for documents of his Official Personnel Folder resulted in furnishing him a fraudulent OPF. Petitioner's first lawsuit for the missing documents, in 1984, induced his letter of July 31, 1984, to defense attorney, requesting, by way of discovery, a list of 22 Items or groups of Items of documents which petitioner knew were included in his OPF. None of those documents were furnished to petitioner. Instead, Office of Personnel Management furnished an affidavit stating that petitioner's OPF had been lost in 1983. Petitioner has documentary evidence which indicates that that statement is false. The withholding of those documents is a violation of the provisions of the Privacy Act. *See* respondents' Exhibit A, letter dated May 1, 1989, *fourth instance*, pages, 4, 5 (A 40, 41). (The fraudulent 1979 OPF is included in petitioner's Volume No. 5.)

38. Petitioner did not have a right to file suit in 1963 for the undisclosed documents of derogatory information which had been used as evidence against him. *See* petitioner's Exhibit 18, paragraph 9 (A 208, 209). Petitioner's 1984 lawsuit for documents was filed within six years of OPM's 1979 refusal to furnish the documents. Respondents have cited a 2-year statute of limitations under the Privacy Act. *See* respondents' Motion to Dismiss or in the Alternative for Summary Judgment, Memorandum, page 2 (A 31). Petitioner previously had cited refusal of his attorney to file suit in 1980. *See* petitioner's Exhibit 2, paragraph 6 (A 108). *See*

Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 7, page 3 (A 412). (Also, petitioner points out that the 2-year statute of limitations can apply to only temporary documents; it cannot apply to permanent documents, as was the case here. *See* petitioner's Exhibit 15, paragraph 53 (A 180).)

39. The court found "that the record reveals no material issue of fact in regard to plaintiff's claim under the Freedom of Information Act." But petitioner has pointed out that the eighteen inches of undisclosed documents of derogatory information were refused by all officials who processed the disciplinary action in 1963-65 and by all officials who processed petitioner's request under the Privacy Act in 1979-84, even though petitioner two times had asked for that information in 1963. *See* petitioner's Exhibit 18, paragraph 13 (A 210).

40. This lawsuit is not for the documents which were withheld in 1963; it is for the documents which were withheld in 1979, under provisions of the Privacy Act. *See* petitioner's Exhibit 18, paragraph 41 (A 219).

41. Petitioner has listed 22 Items or groups of Items of documents of derogatory information which he knows were originally, in 1963, included in his OPF. *See* respondents' Exhibit A, letter dated May 1, 1989, pages 10-12 (A 46-48).

42. OPM's claim that petitioner's OPF was lost in 1983 is a cover-up of the fact that Department of the Army, in 1979, removed the documents of derogatory information from petitioner's OPF, in accordance with established instructions from OPM in 1979. *See* Pro Se Appellant's Brief, Explanation Concerning Wrong Statements, paragraph 4, page 1 (A 382).

(D) With respect to class-action status of violation of the Privacy Act:

43. The Privacy Act of 1974 provides limitation on the kind of documents which the government is permitted to withhold. Petitioner's interpretation of the provisions of the Privacy Act is different from the interpretation by the Office of Personnel Management. *See* petitioner's Motion for Summary Judgment, Memorandum, paragraph 4 (A 99, 100).

44. OPM's form-letter, dated September 17, 1979, stated that the documents of petitioner's OPF were furnished to him "as prescribed by Office of Personnel Management (OPM) instructions." *See* form-letter (A 321). (Those instructions have not been disclosed to petitioner. It is very likely that they were the same as the instructions of the preceding Civil Service Commission, which were based on the district court's bar against lawsuit for certain documents of an OPF. Those instructions may be a direct violation of the law. *See* petitioner's Exhibit 18, paragraphs 14, 20 (A 210, 212). *See* respondents' Exhibit A, letter dated May 1, 1989, third and fourth paragraphs on pages 1 and 2 and *second instance* on page 3 (A 37-39), and *ninth instance*, page 7 (A 43). *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 6 (A 412).

45. Every federal employee who is in a situation such as petitioner was in 1963, being refused due process by concealing the documents of derogatory information, is subject to the same criminal offense as happened to petitioner in 1979, having removal of the documents of derogatory information before releasing the OPF to the employee. *See* petitioner's Motion to Amend petitioner's Motion for Determination as Class Action, paragraphs 4, 7 (A 227, 229).

(E) With respect to the OPF being lost:

46. After respondents furnished petitioner a fraudulent OPF in 1979 and petitioner requested the missing documents, OPM

refused, claiming that the OPF had been lost in 1983. *See* 1991 Complaint, paragraph 18 (A 7).

47. OPM's affidavit that the OPF was lost in 1983 is an attempt to cover up the fact that the documents of derogatory information had been removed before sending the fraudulent OPF to petitioner. *See* petitioner's Exhibit 18, paragraphs 16, 24, 25 (A 211-213).

48. OPM's claim that petitioner's OPF was lost in 1983 is a cover up of the fact that Department of the Army, in 1979, removed the documents of derogatory information from petitioner's OPF, in accordance with established instructions from OPM in 1979. *See* Pro Se Appellant's Brief, Explanation Concerning Wrong Statements, paragraph 4, page 1 (A 382).

49. The documents which OPM sent to National Personnel Records Center (NPRC) on October 12, 1979, which were labeled as petitioner's OPF, were *not* documents of the OPF, but were miscellaneous papers which were associated with the OPF and were the same as the 35 papers which previously had been furnished to petitioner in 1985 as an appendix to an OPM affidavit. The real OPF never was returned by Department of the Army to OPM. The real OPF, or at least the documents of derogatory information which were required by paragraph 19 of AR 345-262 to be included therein, is still in the possession of Department of the Army. *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 5, pages 2, 3 (A 411, 412). *See* OPM's list of OPF's returned to NPRC on October 12, 1979 (A 232). *See* OPM's affidavit dated May 9, 1984 (A 338-341). *See* OPM's affidavit dated December 11, 1984 (A 342, 343). *See* petitioner's Motion to Supplement the Joint Appendix, Memorandum in Support, paragraph 3 (A 418). *See* respondents' Exhibit A, letter dated May 1, 1989, *fourth instance,* pages 4, 5 (A 40, 41). *See* 35 miscellaneous papers which were associated with the OPF (A 344-

378), which are in the court record, but are not reproduced here – part of 1984 Docket Sheet record entry number 7, dated January 16, 1985.

(F) With respect to the 1987 processing of the 1984 case:

50. Five years after the 1987 court decision of the 1984 case petitioner discovered that there was some unknown processing of the case in 1987. *See* Pro Se Appellant's Reply Brief, Comments and Explanations, paragraph 8, page 3 (A 412). Petitioner is wondering if this is another instance in which he has been accused of something and has been refused an opportunity to defend.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL B. WARD
Petitioner, Pro Se

APPENDIX A — ORDER FILED OCTOBER 7, 1992, APPEALS CASE NO. 92-3395

No. 92-3395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL B. WARD,

Plaintiff-Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants-Appellees.

BEFORE: KEITH, JONES and BOGGS, Circuit Judges.

Paul B. Ward, a pro se Ohio resident, appeals a district court order dismissing his civil action filed under 5 U.S.C. § 552a(g)(1). This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 1984, Ward sued several government officials and the United States of America alleging that he was improperly denied access to his personnel records and that his removal from the Army Map Service in 1964 violated his due process rights. The district court dismissed the complaint.

Appendix A

In 1991, Ward sued several government agencies and the United States of America alleging violations of the Freedom of Information Act and the Due Process Clause of the Fifth Amendment. Although naming different defendants, Ward's claims were admittedly identical to those contained in his first suit. Ward requested that the applicable statute of limitations be waived, that his second suit be construed as a motion to reconsider his original action, and that the government be ordered to produce all documents in his personnel file as of 1983. Ward also sought class certification. The parties made cross motions for summary judgment. The district court denied class certification and granted summary judgment for the defendants finding that Ward's suit was barred by the applicable statute of limitations and by the doctrines of res judicata and collateral estoppel.

In his timely appeal, Ward argues that the district court erred by not granting class certification, by not waiving the statute of limitations, and by not reconsidering his first cause of action.

Defendants moved to dismiss the complaint or, in the alternative, for summary judgment. Because evidence outside the pleadings was not excluded from the district court's consideration, the motion must be treated as a motion for summary judgment. *See* Fed. R. Civ. P. 12(b); *Monk v. Marlinga*, 923 F.2d 423, 425 (6th Cir. 1991) (per curiam).

This court's review of a grant of summary judgment is de novo. *See EEOC v. University of Detroit, 904* F.2d 331, 334 (6th Cir. 1990). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Appendix A

Upon de novo review, we conclude that the defendants were entitled to summary judgment as a matter of law. *See Celotex Corp.*, 477 U.S. at 323. Accordingly, we affirm the district court's judgment for the reasons stated in its opinion filed on April 8, 1992. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

APPENDIX B — OPINION AND ORDER FILED APRIL 8, 1992, CASE NO. C2-91-0669

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-91-669

Paul B. Ward,

Plaintiff,

-v-

Office of Personnel Management et al.,

Defendant.

OPINION AND ORDER

I.

Plaintiff, Paul B. Ward, a resident of Franklin County, Ohio, filed this action in the United States District Court for the Southern District of Ohio, Eastern Division, on August 16, 1991. Suit was brought against Defendants, "Office of Personnel Management, National Personnel Records Center, Department of the Army, Merit Systems Protection Board, and the United States of America." The Plaintiff, a former federal employee, alleges that under the Freedom of Information Act, 5 U.S.C. § 552(a)(3), he has a right of access to records contained in his Official Personnel Folder to which he has been denied, violating his due process rights under the 5th Amendment of the United States Constitution. Defendants move to dismiss with prejudice the claims against them pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure on grounds that any claim for relief properly stated therein is barred by the applicable statute of limitations and/or by *res judicata* and collateral estoppel arising from the

judgment rendered by the Honorable James L. Graham of this District in the case of *Ward v. Wilkerson, et al.*, Case No. C2-84-340, filed April 23, 1987.

For the following reasons, the Court will grant the motion to dismiss.

II.

A motion to dismiss attacks the sufficiency of the complaint. In ruling upon such motion, the Court must accept as true all well-pleaded allegations of the complaint, and may dismiss the action only if it appears beyond doubt that the Plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Only the allegations in the complaint itself may be considered and the issue presented is not whether plaintiff ultimately will prevail on the merits, but whether he is entitled to offer evidence to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 594 (1969). The essence of a court's inquiry is to determine whether the allegations contained in the complaint satisfy the mandate of the Federal Rules that the Complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). It is with these standards in mind that the motion to dismiss must be decided.

III.

The facts in this case are as follows. Plaintiff, Paul B. Ward, was employed as a photo composition machine operator for the department of the Army from 1946 until August 16, 1963. Plaintiff was removed by the Commander of the mapping section for

deliberate and willful idleness and loafing on May 27, 1963. Prior to plaintiff's removal, he was afforded numerous review procedures as required by Federal Personnel Regulations. A letter dated August 14, 1963, to plaintiff, from the Corps of Engineers, U.S. Army stated that the charges sufficiently supported his removal from Federal service and informed plaintiff of his right to appeal through various avenues.

Plaintiff Ward appealed his termination through the Department of the Army channels. An examiner reviewed regulatory and procedural aspects, received sworn statements of witnesses and examined the facts and issues. The Chief of Engineers reviewed the record to assure that there had been basic compliance with the laws and regulations concerning plaintiff's dismissal. The Chief of Engineers denied plaintiff's appeal, finding that plaintiff "continued to defy appropriate authority by substituting [his] judgment for that of management despite previous disciplinary actions."

Plaintiff appealed to the Secretary of the Army, and that appeal was denied on August 7, 1964. Plaintiff then filed a complaint in the Federal District Court for the Southern District of Ohio, Eastern Division, on February 17, 1984, some nineteen years after the date on which the Secretary of the Army denied plaintiff's appeal. He alleged that he had been denied access to his personnel records and that his removal from the Army Map service was effected without due process of law.

Plaintiff alleged in that 1984 case that under the Freedom of Information Act, 5 U.S.C. § 552(a)(3), he had a right of access to records contained in his Official Personnel Folder. On May 4, 1979, the plaintiff had requested his records. The National Personnel Records Center furnished certain records to Mr. Ward

pursuant to this request on September 17, 1979. However, Plaintiff Ward stated then, and continues to state, that he was given a stack of documents one inch high, which was considerably less than the eighteen inches of documents in his case folder in 1964. The records provided in 1979 did not include any performance appraisals. Plaintiff instituted the 1984 Federal action against the various named agency heads, alleging that one of them must have removed those performance documents from his file. In granting the defendants' motion for summary judgment in *Ward v. Wilkerson et al.*, Judge James L. Graham of this Court found "that the record reveals no material issue of fact in regard to Plaintiff's claim under the Freedom of Information Act" Civil No. C2-84-340 (1987) at 4. Judge Graham went on to state that the defendants in 1979 sent to plaintiff Ward's attorney all the records contained in the plaintiff's official personnel folder. According to Judge Graham's findings, Plaintiff Ward's personnel file after being copied in 1979, for Mr. Ward, was sent back to the National Personnel Records Center (NPRC) but has been lost since that time. Judge Graham in granting the defendant's Motion for Summary Judgment concluded there had been "no withholding of his [Ward] records". *Id.* at 8. Judge Graham's opinion explained that the missing performance documents would have been destroyed three years after plaintiff left federal employment.

Plaintiff Ward's second cause of action before Judge Graham was an alleged violation of his constitutional "due process" rights as a result of his removal from federal service. Plaintiff's 1964 complaint advanced both equitable "reinstatement" and legal "back pay and damage" claims. Judge Graham in his carefully reasoned opinion held that concurrency of law and equity in the federal courts dictate that where "remediation does not lie exclusively within the main of equity, the availability of legal relief to enforce the underlying right summons the statute of limitations into play as to the whole." *Id.* at 12-13. Judge Graham ruled that

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Plaintiff exhausted his administrative remedies on January 27, 1965, when the Civil Service Commission denied his appeal and that the statute of limitations began to run on that date.

In *Ward v. Wilkerson*, Plaintiff Ward argued that the statute of limitations should be tolled because of two sets of circumstances which were beyond his control. The first was the defendant's alleged refusal to disclose the documentary evidence which was used against him in his four disciplinary actions. The second consideration was plaintiff's inability to find professional legal assistance to file claim for the documentary evidence. Both of these considerations were carefully addressed by Judge Graham and summarily dismissed. *Id.* at 12-13.

Plaintiff Ward filed the instant action on August 16, 1991, alleging violation of the Privacy Act of 1974 and a lack of enforcement of the "due process clause" in discharge cases. Plaintiff alleges that the Federal Government used: (1) "undisclosed documents of derogatory information or undisclosed criticisms" which "have been cited as additional evidence against an employee, after he has defended against stated charges, and (2) those undisclosed documents have been refused disclosure when an employee has requested disclosure (sic)." Plaintiff appears to acknowledge that the present action is a continuation of the 1984 action concerning his dismissal in 1963 and subsequent efforts to obtain his personnel file. Comp. ¶¶ 14-16. Plaintiff acknowledges that following Judge Graham's opinion in *Ward v. Wilkerson*, he agreed to a Voluntary Dismissal of the Appeal to the United States Court of Appeals for the Sixth Circuit. Comp. ¶¶ 21-23.

Plaintiff here claims that his attorney in *Ward v. Wilkerson* did not provide effective assistance of counsel. This claim is based upon the attorney allegedly: (1) refusing to file a Motion for Reconsideration and to file Plaintiff's "Comments on Court

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Decision Dated April 29, 1987", (2) suggesting that the Plaintiff file an appeal and then suggesting dismissing the Appeal, and (3) the attorney's refusal to take any additional action on the matter despite Plaintiff's pleas to do so. Comp. ¶¶ 21-23. Plaintiff's second cause of action in this case is based upon the "Inapplicability of Court Decision" in *Ward v. Wilkerson.* Plaintiff's requests for relief include, among others: (1) a waiver of the statute of limitations back to April 29, 1987 to allow plaintiff to resume that court action, (2) allow this law suit to serve as a Motion for Reconsideration, and (3) to require the Federal Government Produce his Personal File and all documents in it as of 1963.

IV.

In his Complaint, Plaintiff asserts jurisdiction pursuant to 5 U.S.C. § 552a (Privacy Act) and the "due process clause" of the Fifth Amendment to the U.S. Constitution. Comp. ¶ 2. The period of limitations for court proceedings based on alleged violations of the Privacy Act is two years. 5 U.S.C. § 552a(g)(5). Further, under Ohio Law, which would be applicable in this case, the period of limitations for claims based on alleged violation of civil rights guaranteed by the Constitution is also two years. See *Browning v. Pendleton,* 869 F.2d 989 (6th Cir. 1989).

A.

Plaintiff's complaint also alleges various actions or inactions by federal officers or agencies relating back as far as 1963. Comp. ¶ 24(1), 30. The latest alleged act by any party to this law suit appears to have occurred on May 16, 1989. Comp. ¶ 24(5). Inasmuch as those circumstances clearly occurred more than two years before the filing of this Complaint herein on August 16, 1991, this action is barred on its face by both applicable statutes of limitations and therefore is hereby DISMISSED.

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B.

Plaintiff's Complaint here also makes reference to a prior proceeding in the United States District Court for the Southern District of Ohio, Eastern Division, based on substantially the same allegations of fact (with the exception of those involving events since April 1987). Comp. ¶ 14. That prior proceeding was *Ward v. Wilkerson. et al.*, Civil No. C2-84-340, filed February 17, 1984. As in *Ward v. Wilkerson*, the instant matter lists the United States of America as one of the defendants. In *Ward*, Judge Graham granted defendants' motion for summary judgment, upon finding that Plaintiff had "failed to demonstrate that there [was] a genuine issue of material fact pertaining to this request for documents or due process claims." Memo and Order, filed April 23, 1987 at 13. That judgment became final when Plaintiff subsequently dismissed his appeal to the Sixth Circuit on September 8, 1987. Comp. ¶ 22.

The doctrines of res judicata and collateral estoppel bar claims where the same parties were present in a prior litigation and a court of competent jurisdiction rendered a valid final judgment on the merits and the two actions concern the same subject matter or cause of action. *Anchor Motor Freight. Inc. v. International Brotherhood of Teamsters Etc.*, 700 F.2d 1067 (6th Cir. 1983); *see, Shipman v. Frank*, 625 F.2d 80 (6th Cir. 1980); *State Mutual Life Assur. Co. v. Deer Creek Park*, 612 F.2d 259 (6th Cir. 1979); *United States v. LaFatch*, 565 F.2d 81 (6th Cir. 1977), *cert denied* 435 U.S. 971. It is clear, therefore, that all present claims brought by Plaintiff were previously litigated before Judge Graham.

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CONCLUSION

Accordingly, Defendant's Motion to Dismiss is well taken and is hereby GRANTED. Plaintiff's claims are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C — MEMORANDUM AND ORDER FILED APRIL 29, 1987, CASE NO. C2-84-0340

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-84-0340
JUDGE GRAHAM

Paul B. Ward,

Plaintiff,

vs.

Rear Admiral E. A. Wilkinson, Jr., et al.,

Defendant,

MEMORANDUM AND ORDER

This action is before this court on defendants' motion to dismiss or for summary judgment. Fed. R. Civ. P. 56(c), which governs the procedure for summary judgment, provides in part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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The evidence must be viewed in a light favorable to the party opposing the summary judgment motion. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775, 4777 (June 25, 1986).

Plaintiff, Paul B. Ward, was employed as a photo composition machine operator for the department af the Army from 1946 until August 16, 1963. Plaintiff was removed by the Commander of the mapping section for "deliberate and willful idleness and loafing on May 27, 1963". Prior to plaintiff's removal, he was afforded numerous review procedures as required by Federal Personnel Regulations. A letter dated August 14, 1963, to plaintiff, from the Corps of Engineers, U.S. Army stated that the charges sufficiently supported his removal from Federal service, and informed plaintiff of his right to appeal through various avenues. (Defendants' Motion For Summary Judgment, Exhibit 1).

The plaintiff appealed his termination through the Department of the Army channels. An examiner reviewed regulatory and procedural aspects, received sworn statements of witnesses and examined the facts and issues. The Chief of Engineers reviewed the record to assure that there had been basic compliance with the laws and regulations concerning plaintiff's dismissal. The Chief of Engineers denied plaintiff's appeal finding that plaintiff "continued to defy appropriate authority by substituting [his] judgment for that of management despite previous disciplinary actions." (Defendants' Motion For Summary Judgment, Exhibit 3).

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Plaintiff appealed to the Secretary of the Army, and that appeal was denied on August 7, 1964. (Defendants' Motion for Summary Judgment, Exhibit 5).

This complaint was filed on February 17, 1984, over nineteen years from the date on which the Secretary of the Army denied plaintiff's appeal. Plaintiff alleges that he has been denied access to his personnel records and that his removal from the Army map service was effected without due process of law.

This court's jurisdiction for the plaintiff's first cause of action rests upon 5 U.S.C. § 552(a)(4)(B) which provides in pertinent part:

> On complaint, the district court of the United States in the district in which the complainant resides . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

Plaintiff alleges that under the Freedom of Information Act, 5 U.S.C. § 552(a)(3), he has a right of access to records contained in his Official Personnel Folder. On May 4, 1979, the plaintiff, through Attorney Swick, requested his records. The National Personnel Records Center furnished certain records to Mr. Ward pursuant to this request on September 17, 1979. However, plaintiff states in his affidavit that he was given a stack of documents one inch high, which was considerably less than the eighteen inches of documents in his case folder in 1964. The records provided in 1979 did not include any performance appraisals. Plaintiff has instituted this action against the named agency heads, alleging that one of them must have removed those performance documents from his file.

Appendix C

At the outset, this court concludes that the agencies themselves, not individual agency officials, are the proper parties in this action. See *Gary Energy Corporation v. U. S. Department of Energy*, 89 F.R.D. 675 (D. Colo. 1981); *Providence Journal Co. v. Federal Bureau of Investigation*, 460 F. Supp. 778 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010, *cert. denied*, 444 U.S. 1071 (1978); *Weberman v. National Sec. Agency*, 490 F. Supp. 9 (S.D.N.Y. 1980). Summary judgment is appropriate as to the individuals named in the complaint, Rear Admiral E. A. Wilkinson, Jr., Lt. General J. K. Bratton and John O. Marsh. The court further finds that the record reveals no material issue of fact in regard to plaintiff's claim under the Freedom of Information Act, and that the defendant agencies are entitled to summary judgment.

The defendants state that in 1979, all the records contained in the plaintiff's official personnel folder were sent to plaintiff's attorney as requested. Defendants argue that plaintiff's second request for "all the sought-after undisclosed documents" allegedly not sent to him in 1979, is superfluous.

Defendants have submited the affidavit of Timothy R. Crotty. Mr. Crotty is the Chief of the Work Force Records Management Division, Office of Personnel Management, which processes requests from former Federal employees seeking access to their official personnel folders. His testimony indicates that in 1979, Mr. Swick, an attorney representing the plaintiff was sent copies of all records contained in plaintiff's personnel file.

Mr. Crotty stated that his office, after sending plaintiff the copies, would normally send his file back to the National Personnel Records Center (NPRC). According to Mr. Crotty's records, plaintiff's file was returned to NPRC on October 12, 1979 with about 100 other files.

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Mr. Crotty testified that his office received another letter on December 15, 1983, requesting a copy of plaintiff's "personnel folder". This request was accompanied with a form letter from NPRC indicating that plaintiff's file should he in the possession of Mr. Crotty's department. A thorough search was conducted, but plaintiff's file could not be located. Mr. Crotty sent a list of the other files returned to them on that date, but NPRC was unable to find any of the files sent to them in that batch on October 12, 1979. It was determined that plaintiff's file was lost.

Plaintiff alleges that there are still 17 inches of documents somewhere in the government's possession and submitted a Motion to Compel Discovery. Attached to defendant's Memorandum Contra Plaintiff's Motion to Compel Discovery, was the affidavit of Major William S. Trivette, the litigation attorney with the office of the Judge Advocate General, Department of the Army, Washington, D.C.. Major Trivette states that he has personally searched the Pentagon Library for certain documents requested by plaintiff in his Motion to Compel Discovery. Major Trivette has identified the status and whereabouts of a number of these alleged missing documents. Items numbers 23 through 30 have either been forwarded to plaintiff or were determined never to have existed. The remaining documents numbered 1 through 22 related to correspondence and records pertaining to each of the four disciplinary actions involving plaintiff.

Under 5 U.S.C. § 552(F), each agency must promulgate rules to establish procedures to enable an individual to receive records pertaining to him. The Office of Personnel Management has promulgated rules pertaining to the information contained within a person's Official Personnel Folder.

The retention of plaintiff's records would be governed by 5

CFR § 293.404. This section states that performance appraisals or documents supporting them are generally not permanent records and are retained as prescribed below:

> (i) performance rating of record, including the performance plans on which they are based, shall be retained for 3 years;
>
> (ii) supporting documents shall be retained for as long as the agency deems appropriate (up to 3 years).

In 1979, plaintiff received copies of all the permanently retained records in his file, plus some additional records that would normally have been destroyed. The missing 17 inches of "performance documents" would have been destroyed according to the regulations promulgated by the Office of Personnel Management.

Plaintiff has provided no evidence to refute the conclusion that his files have been lost, and there is little doubt that this is the case. Normally, when the government makes the personnel records in its possession available to a former federal employee it has done all that is required under this section. Production of missing records is not required. *Nolen v. Rumsfeld*, 535 F.2d 890 (5th Cir. 1976).

Plaintiff requested and received the records the agency was required to permanently maintain. Once those "records are produced and the substance of the controversy disappears it becomes moot since the disclosure which this suit seeks has already been made." *Crooker v. U.S. State Department*, 628 F.2d 9, 10, (D.C. Cir. 1980).

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In ruling on defendant's Motion for Summary Judgment, the evidence has been viewed in a light most favorable to plaintiff. Upon review of the regulations concerning the maintenance of plalntiff's official personnel folder, this court has determined that there was no withholding of his records. The missing performance documents would have been destroyed three years after plaintiff left federal employment. Therefore, there is no genuine issue as to any material fact concerning plaintiff's claim to these documents.

The plaintiff's second claim alleges a violation of his constitutional due process rights in his removal from federal service. Plaintiff concedes that this court does not have jurisdiction under 28 U.S.C. § 1331 and § 1346.

Plaintiff claims this court has jurisdiction in mandamus under 28 U.S.C. § 1361, "action to compel an officer of the United States to perform his duty". Both parties have submitted a number of cases on the issue of the "nature of the duty" owed to the plaintiff which is the necessary predicate of a mandamus action. The Court of Appeals in *Richardson v. United States*, 465 F.2d 844, 849 (3rd Cir. 1972), rev'd on other grounds, 418 U.S. 166 (1974) determined that in order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which is a specific, plain ministerial act "devoid of the exercise of judgment or discretion." An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt. *United States v. Walker*, 409 F.2d 477 (9th Cir. 1969); *Richardson v. United States, supra* at 849. If the alleged duty is discretionary, not mandatory, ministerial or directory, the duty is not owed. *Short v. Murphy*, 512 F.2d 374, 377 (6th Cir. 1975), *James v. Ambrose*, 367 F. Supp. 1321 (D.V.I. 1973).

On completion of the mandatory or ministerial duty owed to plaintiff, as set out in the Civilian Personnel Regulatons, and in the

absence of any violation by the defendants of those regulations, mandamus would not be proper. The act of discharging the plaintiff after conforming to the mandatory requirements was discretionary. *James, supra* at 1325, See also: *Wilbur v. United States*, 281 U.S. 206 (1930); *Prairie Band of Pottawatomie Tribe of Indians v. Udall*, 355 F.2d 364 (10th Cir. 1966) cert. den., 385 U.S. 381 (1966); *Bowen v. Culotta*, 294 F. Supp. 183 (E.D. Va. 1968).

Other cases confirm that a decision of the Secretary of the Army which is not "positively commanded and so plainly prescribed as to be free from doubt" is discretionary and jurisdiction will not be granted under 28 U.S.C. § 1361. *United States v. Walker, supra* at 481; *Keeny v. Secretary of the Army*, 437 F.2d 1151 (8th Cir. 1971); *Ramirez Alvarado v. Saxby*, 337 F. Supp. 1324 (D.P.R. 1972).

Plaintiff has failed to demonstrate that the duty owed was a mandatory one or that the required procedures were not followed. Plaintiff also had an adequate remedy at law. Therefore, this court does not have jurisdiction under 28 U.S.C. § 1361.

Additionally, plaintiff argues that he has grounds for jurisdiction under 28 U.S.C. § 2201 and § 2202. However, these statutes do not themselves confer subject matter jurisdiction; these statutes are procedural and only provide for remedies which this court may give in actions otherwise within its jurisdiction. *James, supra* at 1324; *Jarrett v. Resor*, 426 F.2d 213, 216 (9th Cir. 1970); *Ragoni v. United States*, 424 F.2d 261, 264 (3rd Cir. 1970).

Therefore, under Fed. R. Civ. P. 12(h)(3), this court lacks jurisdiction over plaintiff's second claim. However, even if this court had jurisdiction it is clear that plaintiff's claim would be time barred.

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The limitation imposed generally by 28 U.S.C. § 2401(a) on litigation brought against the United States bars civil actions unless the complaint is filed within six years after the right of action first accrues. Plaintiff's complaint advances both equitable "reinstatement" and legal "back pay and damages" claims and requires this court to review the effect of 2401(a) on either or both of appellant's prayers for relief.

The court in *Saffron v. Department of the Navy*, 561 F.2d 938 (D.C. Cir. 1977), cert. den., 434 U.S. 1033 (1978) faced the question of whether the improper dismissal claim of a civilian Navy employee was within the scope of § 2401(a) bar. The former employee sought equitable relief and legal relief. The *Saffron* court held that plaintiff's equitable claims for reinstatement as well as his legal monetary damages, were barred by the statute. The court went on to note that the concurrency of law and equity in the federal courts dictate that where "remediation does not lie exclusively within the main of equity, the availability of legal relief to enforce the underlying right summons the statute of limitations into play as to the whole." *Id* at 946. *Accord: Stevens v. Tennessee Valley Authority*, 712 F.2d 1047 (6th Cir. 1983); *Walters v. Secretary of Defense*, 725 F.2d 107, 112 (D.C. Cir. 1983); *Oppenheim v. Campbell*, 571 F.2d 660 (D.C. Cir. 1978); *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 and n.6 (D.C. Cir. 1982); *White v. U. S. Civil Service Commission*, 589 F.2d 713, 715 (D.C. Cir. 1978) *cert. den. sub nom. White v. Office of Personnel Management*, 444 U.S. 830 (1979).

By the terms of the statute the six year limitation began to run from the time the right of action first accrued. *Saffron, supra* at 942. Plaintiff exhausted his administrative remedies on January 27, 1965, when the Civil Service Commission denied his appeal. The statute of limitations began to run on that date.

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Plaintiff claims that the statute of limitations should be tolled, because in this case there have been two sets of circumstances which were beyond his control. The first factor was defendant's alleged refusal to disclose the documentary evidence which was used against him in each of four disciplinary actions. The second consideration was plaintiff's inability to find professional legal assistance to file claim for the documentary evidence.

Plaintiff through his own evidence negates these allegations. In his affidavit, submitted to this court on January 30, 1987, with Plaintiff's Brief Contra, at paragraph 23, plaintiff states that in preparing his appeal to the Secretary of the Army in 1964, he included "citations of instances of fradulent personnel system, a fradulent grievance system, reprisal actions, false and misleading information which constitutes a cover-up or wrongdoing, and evidence of undisclosed documents which were used as evidence against me."

Plaintiff in his affidavit submitted to this court on November 6, 1986, admits that he had knowledge of the alleged wrongful withholding of evidence and states in Exhibit A, paragraph 1, "On 9 June, 1964, I met Mr. Reback [an attorney] with a request to see if he could obtain a delay in the decision by the Secretary of the Army until I could prepare an appeal statement, in the absence of documents which had been cited as evidence against me".

In paragraph 2, plaintiff states "On 11 February, 1965, I wrote to Mr. Gasch, [an attorney], seeking to set aside the secretary's decision until I could prepare an appeal statement explaining the false and misleading information on which it was based".

In paragraph 3, plaintiff states he contacted a third attorney, Mr. Scott seeking assistance in setting aside the Secretary's

decision, because it contained *false and misleading information*. Plaintiff claims that it was impossible to prepare a statement in so short a time, as the grievance examiner had cited eighteen inches of documents and "all the important ones had been refused disclosure to me . . .".

Thus, plaintiff's own affidavits indicate that in 1964 and 1965, he was well aware of the claims he now raises and had access to legal advice at that time. Plaintiff's excuses for not timely pursuing the matter do not toll the running of the statute of limitations in this case.

The plaintiff, having been given the benefit of all reasonable inferences, has failed to demonstrate that there is a genuine issue of material fact pertaining to his request for documents or due process claims. The defendants Rear Admiral E. A. Wilkinson, Jr., Lt. Gen. J. K. Bratton, John Marsch and the United States are entitled to judgment as a matter of law. The defendants' motion for summary judgment is hereby GRANTED.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge